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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 73-74

JAMES R. HOFFA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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IN THE

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No. .....

JAMES R. HOFFA,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

The petitioner James R. Hoffa respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 3, 1973.

OPINIONS BELOW

The majority and dissenting opinions of the Sixth Circuit are reported at 471 F. 2d 391 (1973) and are printed as Appendix A, *infra*. The Sixth Circuit's denial of peti-

tion for rehearing is printed as Appendix B, *infra*. The opinion of the District Court is reported at 339 F. Supp. 388 (E.D. Tenn. 1972) and is printed as Appendix C, *infra*. The majority and dissenting opinions of the Sixth Circuit affirming the denial of petitioner's Fourth Motion for New Trial are reported at 437 F. 2d 11 (1971) and are printed as Appendix D, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 3, 1973. The Court of Appeals denied a timely petition for rehearing on April 11, 1973. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment right to due process of law was violated by the government's knowing use of perjured testimony and whether the District Court should have at least ordered an evidentiary hearing to develop the factual allegations of perjury set out in petitioner's Motion to Vacate?

2. Whether this Court's holding in **Harris v. Nelson**, 394 U.S. 286 (1969), requires that petitioner be allowed to take the deposition of the key government witness when such a deposition would more fully develop the specific allegations of the perjury of said government witness, especially when the existence of the evidence of such perjury was not known to petitioner until after trial due to government concealment and suppression?

3. Whether the government's inherently unfair concealment and suppression of evidence violated petitioner's rights under the Fifth Amendment when such evidence was material to the question of petitioner's guilt and affected the credibility of a key government witness?

4. Whether this Court in its supervisory role over the federal courts should further interpret **Brady v. Maryland**, 373 U.S. 83 (1963), and set forth specific guidelines to prevent future intentional concealment and suppression of evidence by the government?

5. Whether a trial judge is in error in refusing to recuse himself when he has made determinations in a case prior to the filing of a Sec. 2255 Motion (Court of Appeals suggested the filing of said motion), which raises the same issues as those already decided by that court?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2255, Title 28 U.S.C., provides in pertinent part:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence . . ."

United States Constitution, Amendment V provides in part:

> ". . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT

Petitioner Hoffa and co-defendants Parks, Campbell and King were convicted on March 4, 1964 of wilfully endeavoring to influence, intimidate and impede jurors in the discharge of their duties in violation of 18 U.S.C. § 1503. This charge arose out of a prior trial involving Hoffa, generally

referred to as the "Test Fleet" case. The convictions were affirmed by this Court. **United States v. Hoffa, et al.**, 385 U.S. 293 (1966).

Following petitioner's conviction, he filed several motions for new trial all of which were denied by the trial court and affirmed on appeal. While the petition for writ of certiorari was pending in this Court to review the fourth motion for new trial, the Solicitor General revealed that it had in its possession an undisclosed number of conversations between **two** of the defendants in the case, which conversations were monitored by the government during the course of electronic survellances. This Court granted certiorari, set aside the judgment and remanded the case to the district court to determine the lawfulness of the surveillances.

Eavesdrop Hearing

During the hearing, the trial court took the position that the government had represented at trial that there were **no** overhearings of the defendants, and that then [i.e. at time of the hearing] the government was admitting there were overhearings of **two** defendants, namely **Hoffa** and **Campbell**. Accordingly, a motion for production of all such conversations of defendant **King** was denied based on these representations of the government.

During the evidentiary hearing, Walter Sheridan, Special Assistant to the then Attorney General Robert Kennedy, testified as a government witness that he was in charge of the overall Hoffa investigation and that he had **never** asked **any** federal employee to eavesdrop on **any** defendant in this case. Only on cross-examination, and after testifying that he was **not** saying there was **any** eavesdropping, did Sheridan confess that FBI agents had indeed placed a recording device and hidden microphone in the automobile of Edward Grady Partin, the chief government witness against Hoffa, and that a conversation between

Partin and defendant **King** had been overheard, recorded, and transcribed shortly before the indictments were returned. Government counsel later admitted that they **had known** the bugging was planned, had authorized it, that its purpose was to secretly interview King and had **not** told the Court or defendants.

At the evidentiary hearing the trial Court found that no constitutional rights of the defendants had been violated, that the recordings had not been used at trial and that they were not of an incriminating or exculpatory nature. **United States v. Hoffa**, 307 F. Supp. 1129 (1970). This decision was affirmed by the Court of Appeals by a 2-1 margin. **United States v. Hoffa**, 437 F. 2d 11 (1971).

The majority of the Court of Appeals held that it was presented **only** with the question of the legality of the surveillances and that the newly discovered facts which Circuit Judge McCree, concurring in part and dissenting in part, felt raised "a serious question whether the government knowingly used perjured testimony in the original trial", were not properly before the Court. Thereafter, petitioner filed a Motion to Vacate pursuant to § 2255 of Title 28, U.S.C., and raised said issues.

Motion to Vacate

Petitioner's Motion to Vacate alleged that Partin had committed perjury at the trial and that the government was unquestionably aware of the falsity of his testimony.

The Amended Motion to Vacate set out specific instances of Partin's alleged perjury, to wit:

1) Partin testified at the trial that "I have never agreed to be an informer, sir."

2) In response to the question whether Sheridan kept urging him to get more and more evidence on more and more people, Partin said, "He has never urged me to do anything other than what I saw."

3) Partin testified ". . . I wasn't interested in getting anyone involved."

4) When asked if at any time in 1962 he was interested in seeing anyone get involved in anything, Partin said, "What are you saying, are you trying to make it look like I try to trap someone as such? No."

5) The following testimony of Partin's dealt with his activities with Sheridan.

"Q. Did he give you any instructions with respect to your duties in overhearing things between the various parties in the case?

A. No, sir, I didn't have any duties when it came to that."

"Q. Did he give you any device or listening instrument to assist you in your work?

A. No, sir."

"Q. You did not receive any?

A. No, sir."

6) Partin claimed, "I wasn't working for the government, sir."

7) The following questions again concerned Partin's dealings with Sheridan:

"Q. Did you ever receive any instructions from Mr. Sheridan which related to your obtaining information concerning the course of the case?"

A. "By instruction, what do you mean? Would you qualify it?"

Q. "By instructions to refrain from doing an act or saying certain things?"

A. "No, sir."

Q. "Did he ever tell you to say certain things to Mr. Hoffa or any of the people connected with the case?"

A. "No, certainly not."

8) Partin testified that he came to Nashville at Hoffa's invitation, that he went for Hoffa's benefit, and that he was interested in talking to Hoffa only because Hoffa had told him to come.

9) When asked if he had had any kind of recording machine to take down everything he heard so that he could review and impress his mind, Partin said "No, sir, I did not."

10) Partin testified he had never gone to Washington, D.C. in connection with the Hoffa case, but that on the one time he went to Washington, D.C., he had talked to Sheridan on another matter and merely because he was in town.

While the Motion to Vacate was pending in the District Court, petitioner caused a deposition subpoena to be served by a Deputy Marshal on Partin and served a notice to take said deposition on government counsel. The government opposed same for the reason that petitioner had not filed the amendment to his Motion to Vacate. The trial Court quashed the subpoena. This was done even though the Court had been given a typed statement purportedly made by Partin which clearly showed inconsistencies between his testimony at trial and what he now claimed to be true. Shortly thereafter, petitioner filed the amendment to his Motion to Vacate and filed an application to take Partin's deposition. The government again opposed the taking of the deposition.

The trial Court dismissed petitioner's Motion to Vacate **without** permitting the deposition and **without** granting an evidentiary hearing. **Hoffa v. United States**, 339 F. Supp. 388 (1972). This was affirmed by the Court of Appeals by a 2 to 1 vote, Circuit Judge McCree concurring in part and dissenting in part, stating that petitioner was entitled to a hearing on the question whether Partin's testimony was false and known to be false by the government. **Hoffa v. United States**, 471 F. 2d 391 (1973), reh. denied.

REASONS FOR GRANTING THE WRIT

I

The Government's Knowing Use of Perjured Testimony Violated Petitioner's Right to Due Process of Law.

As shown in the Statement, petitioner's Amended Motion to Vacate set out specific instances in the transcript of the testimony of Edward Partin which, on its face, have since been proven to be false. At a minimum, after the suppressed evidence (i.e. that the government had bugged King) was revealed at the eavesdrop hearing, it was clear that a serious possibility existed that the government knowingly used perjured testimony at the trial. This possibility was suggested by Circuit Judge McCree in the petitioner's appeal of the denial of his Fourth Motion for New Trial. Of course, the majority of the Court of Appeals did not consider the issue, stating that the facts revealed at the eavesdrop hearing relating to the alleged knowing use of perjured testimony should be raised by appropriate procedures in the District Court.

Petitioner submits that the District Court simply glossed over the substantial perjury questions raised in petitioner's motion to vacate. Also, the Court twice blocked petitioner's attempt to take the deposition of Partin which might very well have conclusively determined whether or not perjury had been knowingly used by the government. The lower court also refused to grant an evidentiary hearing as Circuit Judge McCree had urged, in which Partin and other government witnesses could have been examined under oath as to their knowledge and use of perjured testimony.

Instead of permitting the time tested process of questioning witnesses under oath, the lower court simply

speculated as to what Partin **really** meant when he made statements which when taken at their plain meaning are indeed false. A careful reading of the alleged instances of perjury establishes that Partin falsely denied being an informer, denied that he had ever tried to involve anyone in this case in all of 1962, denied that he had been given a device or listening instrument by Walter Sheridan, and claimed that he was Hoffa's invited guest in Nashville who had come only to benefit Hoffa. Petitioner submits that the record as it now stands establishes that the government knowingly used perjured testimony at the trial.

At a minimum, these and other instances set out in the Motion, along with the typed statement purportedly made by Partin in March, 1971 (which confirms that petitioner's allegations as to Partin's perjury are correct), show that petitioner has not been allowed to fully develop facts which could sustain his substantial allegations of perjury. Thus the serious question of perjury remains!

This Court has held in **Napue v. Illinois**, 360 U.S. 264 (1959), that the government's knowing use of perjured testimony is a denial of due process of law. Such use constitutes federal constitutional error which affects a defendant's substantial rights and no showing of prejudice is required for reversal. **Chapman v. California**, 386 U.S. 18 (1967); **Shields v. United States**, 273 U.S. 583 (1927).

Petitioner submits that the instances of perjury in this case warrant this Court granting certiorari to review same and to reverse the conviction outright, or at a minimum order an evidentiary hearing whereby the facts surrounding said allegations of perjury could be fully developed and a determination made as to whether petitioner's right to due process of law was violated.

II

The Decision Below Denying Petitioner's Request to Take the Deposition of Edward Partin Conflicts With the Principles Enunciated by This Court in Harris v. Nelson, 394 U.S. 286, and With Other Courts of Appeals.

While this Court has limited the use of discovery procedures in habeas corpus proceedings, it held that:

". . . in appropriate circumstances, a district court confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to 'dispose of the matter as law and justice require'." **Harris v. Nelson,** 394 U.S. 286, 290 (1969).

This Court went on to say, in **Harris,** that where specific allegations show reason to believe that if the facts are fully developed the petitioner may be able to show he is entitled to relief, it is the duty of the Court to provide the necessary facilities and procedures for an adequate inquiry. Petitioner submits that the finding by the trial court that Partin did not perjure himself was based on **speculation** as to what the real meaning was to Partin's testimony which, on its face, clearly contradicts evidence revealed during the eavesdrop hearing and in the typed statement purportedly made by Partin in March, 1971. Circuit Judge McCree seemed to agree for he stated that this evidence "raises a serious question whether the Government knowingly used perjured testimony in the original trial." 437 F. 2d 11, 19. For these reasons, instead of speculating as to the real meaning of seemingly perjurous statements, petitioner submits that under the guidelines set out by this Court in **Harris v. Nelson,** the use of depositions would have best served the requirements of law and justice. Indeed, we suggest that the most effective and conclusive means of

determining that the allegations of perjury were false would have been to permit the deposition to be taken.

The use of discovery in a similar situation has been approved in both the Ninth and Second Circuits. In **Wilson v. Weigel**, 387 F. 2d 632 (1967), petitioner in a habeas corpus proceeding was allowed to take the deposition of a government witness. There, the Court stated that the witness' connection with the case was such that she was:

> "in a position to give evidence as to the alleged knowing use of perjured testimony by the prosecution. If it is proper to call her as a witness, it is proper to take her deposition." 387 F. 2d at 634.

The Second Circuit has also held that where evidence which was not available at trial is used to substantiate a petitioner's allegations for post-trial relief, discovery may be appropriate. In **United States v. Wolfson**, 413 F. 2d 804, 808 (1969), the Court held:

> "In some instances when possible exculpatory evidence not known by a defendant to exist at the time of trial is later shown to have then been in the Government's hands and the information necessary to develop fully the exculpatory nature of the evidence must be obtained from government sources it might be improper for a district judge to deny a motion for discovery . . ." 413 F. 2d 804, 808.

The evidence produced after the trial of this case, namely at the eavesdrop hearing and the statement purportedly made by Partin in March, 1971, clearly brings into question the possibility of governmental use of perjured testimony. Petitioner submits that the Sixth Circuit's decision here is in direct conflict with this Court's decision in **Harris v. Nelson**, *supra*, and with decisions of the Second and Ninth Circuits. Petitioner submits that said conflict justifies the grant of certiorari to review the judgment below.

III

The Government's Concealment and Suppression of the Evidence of Its Eavesdropping Activity, Including the Partin-King Conversation, Violated Petitioner's Right to Due Process of Law.

Petitioner submits that the record clearly establishes that there has been a consistent pattern at both the trial and appellate level in this case of governmental misrepresentations and concealment of evidence as to its eavesdropping activities. This being the case, petitioner urges this Court to grant certiorari and establish clear guidelines so that such conduct will not occur again.

During the trial, the chief government prosecutor offered to testify under oath that "there has been no surveillance of **any** defendant or defense counsel in this case." After having made this assertion, government counsel repeatedly objected to defense questioning of Walter Sheridan as to his knowledge or authorization of the eavesdropping activity of Edward Partin. We **now** know that defendant King's conversation with Partin was "bugged."

Prior to the eavesdrop hearing ordered by this Court, the district court stated that the government had represented that it had no overhearings of conversations of defendant King and that any conversations of the defendants must then be revealed. After the hearing began, the trial Court again stated that **all** overhearings should be disclosed and that government counsel had represented at trial that there were **no** overhearings. **Even after these pronouncements by the Court, the government continued to suppress and conceal evidence which the Court had demanded be revealed.** For instance, Walter Sheridan, a government witness, testified on **direct** examination at the hearing that he sad never asked "any federal agent or any federal employee to eavesdrop on **any** defendant in

this case." Only on **cross-examination** did he admit that F.B.I. agents had installed a tape recorder in Partin's car and had taped a conversation between Partin and defendant King. Not only was Sheridan aware of this recording, but the chief prosecutor, who had stated at trial that he would swear there were no surveillances of the defendants, also admitted on cross-examination that he had known of the recording and had not disclosed it to the Court.

A. The evidence concealed and suppressed by the government was material to the question of petitioner's guilt.

This Court has held in **Brady v. Maryland**, 373 U.S. 83 (1963), that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. Petitioner submits that the content of the Partin-King recording was clearly material to the question of petitioner's guilt or innocence. For example, Partin testified at trial that King had made flagrant incriminating statements to him and yet the suppressed taped conversation, where the government was actively using Partin to attempt to obtain incriminating evidence from King, contained (according to the trial Court) no incriminating statements. **Query**: Shouldn't the jury have been permitted to know this?

The district court, which had acknowledged after the eavesdrop hearing that the "bugged" conversation related to issues in this case, dismissed petitioner's motion to vacate claiming that the conversation was not of an incriminating or exculpatory nature. Yet, under **Brady**, the conversation is clearly exculpatory in that it shows that Partin failed to obtain incriminating statements from King in direct contradiction to his sworn testimony.

B. **The suppressed and concealed evidence was favorable to petitioner and affected the credibility of a key prosecution witness.**

Even if, *arguendo,* this Court were to find that the suppressed evidence was not directly material to the question of petitioner's guilt, its concealment and suppression was still violative of petitioner's right to due process. If the evidence is favorable to the defendant and affects the credibility of a key prosecution witness, intentional suppression of the evidence may be so inherently unfair as to violate due process of law. **United States v. Harris,** 462 F. 2d 1033 (10th Cir. 1972). **Link v. United States,** 352 F. 2d 207 (8th Cir. 1965), cert. den. 383 U.S. 915.

While petitioner submits that the suppressed Partin-King recording materially related to the question of his guilt or innocence, the conversation also greatly affected the issue of the credibility of the government's key witness Edward Partin. Partin testified at trial that he was not an informer, that at no time in 1962 was he concerned about involving anyone, that he had never tried to trap anyone, that Sheridan had **never** given him a device or listening instrument to assist him in his work, that he had never received instructions from Sheridan relating to his obtaining information for the case, and that he was not supposed to say certain things to anyone connected with the case. All of this testimony by Partin is directly controverted by the existence of the Partin-King recording.

Petitioner submits that the government's intentional suppression of the Partin-King recording in blatant disregard of the district court's direction was inherently unfair to the petitioner in that it precluded the use of the tape and its contents in challenging the credibility and veracity of Partin, whose testimony was crucial to the prosecution. The nefarious and contemptuous nature of the government's conduct and its effect on the petitioner's ability to discredit the key government witness were so inherently

unfair as to constitute a violation of petitioner's right to due process. Petitioner submits that this Court should review such conduct and set forth specific guidelines regarding said conduct so that the government will not repeat what has occurred here. Surely at this time, in light of the revelations in the "Pentagon Paper's Case" and "Watergate", it would be important to the cause of criminal jurisprudence that this Court further interpret and define the teachings set forth in **Brady.**

IV

The Decision Below Directly Conflicts With the Decision of Another Court of Appeals as to Whether the Trial Court Should Have Recused Himself.

Petitioner's Motion to Vacate requested the District Court to recuse himself for the reason that the trial court had previously considered and overruled certain issues which were being raised in the Motion to Vacate.[1] The trial Court refused.

The Sixth Circuit in affirming the trial court's decision to hear the Motion to Vacate stated that even if the issues presented in the Motion had previously been decided, it would still have been proper for Judge Wilson to have heard the proceeding. Petitioner submits that such decision directly contradicts the holding in **Halliday v. United States,** 380 F. 2d 270 (1967). In **Halliday,** the First Circuit held that it is inappropriate for a Judge to sit in section 2255 matters when he would review the correctness of

[1] Petitioner's Motion for Order Setting Aside Judgment of Conviction filed in the District Court in August, 1969 at the close of the eavesdrop hearing alleged as follows: "The government at the trial of this cause, well knowing that it had in its possession the recorded statement of the defendant King and the witness Edward Grady Partin, submitted the introduction of falsely misleading testimony by the witness Partin that he had not recorded any conversations of the defendant (except the defendant Hoffa), and prevented the defense from properly cross-examining the witness on said issues."

his own determinations. The Court said that this was especially true "when the court is reweighing factual inferences and credibility, as distinguished from applying rulings on issues of law." 380 F. 2d at 272-3.

The District Court here was clearly making **factual inferences** in denying the allegations of petitioner that the government had knowingly used perjured testimony. Additionally, petitioner submits that Judge Wilson had previously made determinations on some factual issues raised in the Motion to Vacate and therefore should have recused himself.

Petitioner submits that the holding of the Sixth Circuit in allowing Judge Wilson to hear the Motion to Vacate directly conflicts with the First Circuit in **Halliday**, and that said conflict between the Circuits justifies this Court's granting certiorari here to review this issue.

CONCLUSION

For the reasons stated herein, we respectfully submit that the petition should be granted.

Respectfully submitted

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APPENDIX

APPENDIX A

No. 72-1332

United States Court of Appeals
For the Sixth Circuit

James R. Hoffa,
Petitioner-Appellant,
v.
United States of Amercia,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee

Decided and Filed January 3, 1973

Before: Phillips, McCree and Cecil, Circuit Judges
Phillips, Chief Judge

This case involves a motion by James R. Hoffa to vacate sentence under 28 U.S.C. § 2255. District Judge Frank W. Wilson denied the motion in an opinion published at 339 F.Supp. 388 (E.D.Tenn. 1972). We affirm.

Hoffa, Ewing King, Larry Campbell and Thomas Ewing Parks were convicted on March 4, 1964, of willfully endeavoring to influence, intimidate and impede jurors in the discharge of their duties in violation of 18 U.S.C. § 1503. The charge grew out of a prior trial, now generally referred to as the "Test Fleet" case, wherein Hoffa was the only individual defendant.

Litigation arising out of the incidents surrounding the "Test Fleet" trial has been voluminous. Even before the jury tampering trial commenced, extensive motions were filed: see for example Hoffa v. Gray, 323 F.2d 178 (6th Cir.), cert. denied, 375 U.S. 907, 84 S.Ct. 199, 11 L.Ed.2d 147

(1963); United States v. Hoffa, 235 F.Supp. 611 (E.D.Tenn. 1964).

Ultimately the defendants were brought to trial and found guilty. These convictions were affirmed over several contentions by the defendants, including an allegation that the testimony of a principal Government witness, Edward Partin, should have been suppressed for an alleged interference with the attorney-client relationship. United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), rehearing denied, 386 U.S. 951, 87 S.Ct. 970, 17 L.Ed.2d 880 (1967).

A motion for a new trial on grounds of newly discovered evidence and for disqualification of District Judge Wilson for alleged bias was overruled. United States v. Hoffa, 245 F.Supp. 772 (E.D. Tenn. 1965).

A second motion for a new trial was filed on March 18, 1964, alleging newly discovered evidence primarily relating to the activities of Partin. This motion was denied. United States v. Hoffa, 247 F. Supp. 692 (E.D.Tenn. 1965), aff'd 376 F. 2d 1020 (6th Cir.), cert. denied, 389 U.S. 859, 88 S.Ct. 102, 19 L.Ed.2d 124 (1967).

A third motion for a new trial was filed in September 1965 alleging that the marshals and jurors had been guilty of intoxication and having improper relationships with prostitutes during sequestration. It was further argued that the trial judge should have disqualified himself from hearing the motion since it was alleged that he had expressed biased opinions while involved in similar activities.[1] This motion was denied. United States v. Hoffa, 247 F. Supp. 692 (E.D.Tenn. 1965), aff'd, 382 F.2d 856 (6th Cir.

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[1] An affiant who later testified before a grand jury was convicted of perjury in connection with these allegations. United States v. Johnson, 414 F.2d 22 (6th Cir. 1969), cert. denied, 397 U.S. 991, 90 S.Ct. 1112, 25 L.Ed.2d 399 (1970), rehearing denied, 397 U.S. 1071, 90 S.Ct. 1495, 25 L.Ed.2d 696 (1970).

1967), cert. denied, 390 U.S. 924, 88 S.Ct. 854, 19 L.Ed.2d 984 (1968).

A fourth motion for a new trial was filed in February 1967 in which the petitioners alleged newly discovered evidence of improper electronic surveillance. An evidentiary hearing was scheduled. On the day set for hearing, counsel for petitioners advised the court that for ethical reasons they would not be able to present any evidence at that time. A motion for a continuance was denied and the motion for a new trial denied on the basis of affidavits. United States v. Hoffa, 268 F.Supp. 732 (E.D.Tenn.1967), aff'd, 398 F.2d 291 (6th Cir. 1968).

While the petition for certiorari was pending the Solicitor General disclosed to the Supreme Court that certain conversations in which various defendants were participants had been electronically monitored by the Government. The Court then vacated and remanded to determine if the surveillances were lawful. Giordano v. United States, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969). The hearing on remand disclosed that the Government had installed a recording device in Partin's automobile, with his consent, which device was used to record a conversation between Partin and the defendant King. The District Court found that no constitutional right of any defendant had been violated, that the matters overheard had not been used in any way at trial, and that these matters were neither of an incriminating nor exculpatory character as to any defendant. United States v. Hoffa, 307 F.Supp. 1129 (E.D.Tenn.1970). This decision was affirmed, 437 F.2d 11 (6th Cir. 1971) [wherein Judge McCree concurred in part and dissented in part, p. 19], cert. denied, 402 U.S. 988, 91 S.Ct. 1664, 29 L.Ed.2d 154 (1971).

Hoffa now appeals from the denial of his motion to vacate judgment pursuant to 28 U.S.C. § 2255. 339 F. Supp. 388. This motion is premised upon allegations that

the principal Government witness, Partin, perjured himself and that the attorneys for the Department of Justice were aware of this falsity but made no effort to correct it. Hoffa contends that complete reversal is required, but that at a minimum an evidentiary hearing should be granted wherein he could present evidence in support of his allegations. On appeal, he also assigns error in the refusal of the District Court to permit him to take the deposition of Partin. Finally he contends that Judge Wilson should have recused himself.

As to the allegations of perjury, we affirm for the reasons stated by Judge Wilson. 339 F.Supp. at 392-399.

It also is the appellant's contention that the Government's course of conduct, especially its failure to inform the defense of the Partin-King recording, was so nefarious and contemptuous as to require reversal under the doctrine of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). This is essentially the same argument that previously has been rejected by this court. 437 F.2d at 14-15. There we stated:

> "Appellant also maintains that government nondisclosure of the surveillance and recording of the conversation at the original trial constituted suppression of material evidence under the rules recognized in Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967), and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). At the evidentiary hearing upon remand by the Supreme Court, the District Court reviewed the transcribed text of the conversation and concluded that 'while portions of the recording do relate to the case, they are neither of an incriminating nor an exculpating nature,' (Appended to this opinion is the text of the conversation.) A reading of the **Brady** decision indicates that suppression of evidence following request for disclosure violates

due process 'where the evidence is material either to guilt or to punishment, * * *' Brady v. Maryland, 373 U.S. 83 at 87, 83 S.Ct. at 1197. Independently reviewing the conversation, we agree with the District Court's conclusion that the conversation was neither of an incriminating nor exculpatory character requiring disclosure." 437 F.2d at 14-15.

For the reasons stated above, we again reject this contention.

Next it is asserted that the Harris v. Nelson doctrine, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969), necessitates the granting of appellant's request to take the deposition of Partin. Partin was examined and cross-examined extensively at trial.[2] Now appellant contends that information was developed at the surveillance hearing which indicates that Partin may have perjured himself at trial. Hoffa contends that the only way to substantiate his claim is to depose Partin.

The **Harris** case held that the interrogatory provision of Rule 33 of the Federal Rules of Civil Procedure was not available to a petitioner for habeas corpus. The Court went on to state that some sort of discovery should be permitted where there is reason to believe that if the facts are fully developed the petitioner may be confined illegally. 394 U.S. at 300, 89 S.Ct. 1082. We hold that the District Court did not err in denying discovery in the present case for the reasons stated in his opinion. 339 F.Supp. at 393-398. Therefore we find that the District Court did not abuse its discretion in denying appellant's request for a deposition.

Appellant finally contends that certain issues now being contested have been raised before and therefore Judge Wilson erred in not recusing himself. We disagree.

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[2] Partin testified for seven days at trial, including five days of cross-examination.

In another case growing out of the "Test Fleet" investigation, this court found no impropriety in the same judge hearing a § 2255 motion containing many issues previously raised in a prior motion to vacate. United States v. Osborn, 415 F.2d 1021 (1969), cert. denied, 396 U.S. 1015, 90 S.Ct. 567, 24 L.Ed.2d 506 (1970). This is consistent with the view of most Circuits. United States v. Smith, 337 F.2d 49 (4th Cir. 1964), cert. denied, 381 U.S. 916, 85 S.Ct. 1542, 14 L.Ed.2d 436 (1965). **See also** United States v. Delsanter, 433 F.2d 972 (2d Cir. 1970); King v. United States, 402 F.2d 58 (9th Cir. 1968); Briscoe v. United States, 129 U.S.App.D.C. 146, 391 F.2d 984 (1968); **Contra,** Halliday v. United States, 380 F.2d 270 (1st Cir. 1967), aff'd on other grounds, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969). While it could be argued that, under Judge Wilson's technical holding in the prior motion, none of the issues now raised were decided, we do not feel it necessary to take such a narrow view. We hold that even if such issues were raised it would still have been proper for Judge Wilson to have heard the present proceeding.

Affirmed.

McCREE, Circuit Judge (concurring in part and dissenting in part).

I agree that the District Judge was not required to recuse himself. However, I adhere to the view expressed in my dissenting opinion on the occasion of appellants' previous appeal, **See** United States v. Hoffa, 437 F.2d 11, 19 (6th Cir. 1971), cert. denied, 402 U.S. 988, 91 S.Ct. 1664, 29 L.Ed.2d 154 (1971), that appellants are entitled to a hearing on the question whether Partin's testimony was false and known to be false by the Government.

APPENDIX B

No. 72-1332

United States Court of Appeals
For the Sixth Circuit

James R. Hoffa
v.
United States of America.
} Order Denying Petition for Rehearing

Ordered and Filed April 11, 1973

Before Phillips, Chief Judge, McCree, Circuit Judge, and Cecil, Senior Circuit Judge.

No judge of this court having suggested rehearing in banc, the petition for rehearing has been considered by the original panel.

It is Ordered that the petition for rehearing be denied.

Judge McCree adheres to the views expressed in his separate opinion filed January 3, 1973.

Entered by order of the Court.

APPENDIX C

In the United States District Court
for the Eastern District of Tennessee,
Southern Division

James R. Hoffa
v.
United States of America.
Ewing King
v.
United States of America.
Larry Campbell
v.
United States of America.
Thomas Ewing Parks
v.
United States of America.

Civ. A. Nos.
6222, 6256,
6268, 6276

Opinion

Frank W. Wilson, District Judge

(Filed: February 11, 1972)

The petitioners, James R. Hoffa, Ewing King, Larry Campbell, and Thomas Ewing Parks, were jointly tried and convicted in this court on March 4, 1964, of willfully endeavoring to influence, intimidate, and impede jurors in the discharge of their duties in violation of the Federal Obstruction of Justice Statute (18 U.S.C. § 1503). The style of the criminal proceedings referred to was "United States of America vs. James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King," Criminal Docket No. 11,989 in this court. The case has since had

a lengthy history. Suffice it to say at this point that the conviction and sentence of each defendant was affirmed upon the original appeal and upon three subsequent post-trial proceedings. The present petitions constitute the fifth post-trial proceedings wherein the petitioners have sought to set aside their convictions and sentences in the aforesaid criminal case. Each defendant has now fully completed serving the sentence imposed in the criminal case other than the defendant Hoffa, who has recently been released from the sentence of confinement but remains under parole supervision.

These cases, seeking further post-conviction relief, are presently before the Court upon the petition of James R. Hoffa filed pursuant to Section 2255, Title 28, U.S.C., and the petitions of Ewing King, Larry Campbell, and Thomas Ewing Parks, seeking relief by way of a Writ of Error Coram Nobis. All petitions are substantially identical and the Government has filed an identical response to each petition. No issue has been raised as to the availability of the Writ of Error Coram Nobis or as to the relief obtainable thereunder by those petitioners whose sentences have now been completed. The cases have accordingly been consolidated.

Each of the petitioners now before the Court seeks to have his conviction set aside and a new trial granted and as grounds for such relief allege that a witness who testified against them, Edward Grady Partin, gave false testimony on the criminal trial and that the Government allowed the testimony to go uncorrected even though it knew it to be false. The petitioners contend that such knowing use of false testimony amounts to a denial of due process as affirmed in the case of Napue v. Illinois (1959), 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217.

In response the Government denies that the witness Partin gave false testimony and denies that the Govern-

ment knowingly used any false testimony in obtaining the petitioners' convictions. In support of their denial and in support of the factual and legal correctness of the defendants' convictions, the Government relies upon the record heretofore established in the criminal trial and in the previous post-trial proceedings.

In their present initial petitions the petitioners each alleged that the witness Partin testified falsely "that he had never agreed to be an informer, had never tried to trap anyone, and was not given instructions by Walter Sheridan concerning the overhearing of things and was never given any device or listening instrument by Walter Sheridan." They further allege that the falsity of this evidence and the Government's knowledge of that falsity was established in the course of the evidentiary hearings regarding electronic surveillance held in connection with the petitioners' fourth motion for new trial. Upon direction of the Court, the petitioners have since amended their petitions so as to make specific reference to those portions of the criminal trial testimony which it is contended were false and were known to be false by the Government. It is accordingly appropriate that the Court should consider each of these references in the light of the full record, including the record upon the criminal trial and the record upon prior post-trial proceedings, including the record made at the evidentiary hearing upon the fourth new trial motion respecting electronic surveillance.

Background

Since the foregoing records regarding the petitioners' convictions and post-trial proceedings have become so voluminous, it would be helpful at this point to make some summary statements regarding those records.

Upon May 9, 1963, the petitioners herein, James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King,

were indicted, along with others, in a multi-count indictment charging them with conspiracy and with violation of the Federal Obstruction of Justice Statute. The various counts of the indictment charged the defendant Hoffa, along with one or more of the co-defendants, with having corruptly endeavored to influence jurors in connection with their deliberations in a prior criminal trial, often referred to in the record as the "Test Fleet Trial," wherein Mr. Hoffa was the only party defendant. The Test Fleet Trial occurred in October, November, and December 1962 in the United States District Court at Nashville, Tennessee, and resulted in a mistrial when the jury was unable to agree upon a verdict.

Following extensive pre-trial proceedings (see for example Hoffa v. Gray, 323 F.2d 178 (C.A.6, 1963); cert. denied 375 U.S. 907, 84 S.Ct. 199, 11 L.Ed.2d 147; United States v. Hoffa, D.C., 235 F.Supp. 611 (1964), affirmed 349 F.2d 20 (C.A. 6, 1965), affirmed 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) reh. denied 386 U.S. 940, 87 S.Ct. 970, 17 L.Ed.2d 880 (1967)), including the withdrawal of the original trial judge and the assignment of the undersigned as the trial judge, the criminal case here under attack went to trial in this court upon January 20, 1964. The first count, charging a criminal conspiracy, was severed, and the case went to trial upon the four substantive counts charging the defendants with obstruction of justice. The trial extended over a period of some seven weeks, involved some 123 witnesses and some 254 exhibits and accumulated a record of 9284 pages. At the conclusion of the Government's proof the Court directed a verdict of acquittal as to the defendant Hoffa upon the second count, deeming the evidence insufficient upon that count to submit to the jury.[1]

[1] The co-defendant named in the second count was tried in a separate trial and found guilty. His conviction was affirmed upon appeal. See United States v. Medlin, 353 F.2d 789 (C.A. 6, 1965).

The trial continued from day to day until March 4, 1964, when the jury returned a verdict finding the defendants Hoffa, Parks and Campbell guilty upon the third count and finding the defendants Hoffa and King guilty upon the fifth count. The jury found the defendants Hoffa, Tweel, and Dorffman not guilty upon the fourth count.

Without attempting any detailed summary of the evidence, the substance of the testimony of the Government's witnesses may be briefly stated as follows.

On October 22, 1962, the selection of the jury commenced in the United States District Court at Nashville, Tennessee, in the "Test Fleet" case, a criminal trial in which Mr. Hoffa was the only party defendant. Two associates frequently with Mr. Hoffa throughout the trial were Ewing King, an official of the Teamsters Union Local at Nashville, Tennessee, and Edward Grady Partin, an official of the Teamsters Local at Baton Rouge, Louisiana. Upon the second day of the jury voir dire Mr. James Tippens, one of the prospective jurors, reported to the trial judge, William E. Miller, that he had been contacted the previous evening by one Lawrence Medlin regarding his jury service and reported his conversation with Medlin in this regard. Judge Miller excused the juror from the panel and advised Mr. Hoffa and his counsel that Mr. Tippens had reported that he had been offered $10,000 by Mr. Medlin "to be paid in one hundred dollar bills" to influence him if he were selected as a juror. In regard to this juror incident, Mr. Hoffa stated to Mr. Partin that "The dirty bastard went in and told the judge his neighbor had offered him $10,000. We are going to have to lay low for a few days."

One of the jurors selected to try the "Test Fleet" case was Gratin Fields, a black man. During the course of the "Test Fleet" trial, Larry Campbell, a business agent in the Detroit Teamsters Union Local, of which Mr. Hoffa was

president, contacted in Nashville his uncle, Thomas Ewing Parks, also a black man, and got him in turn to contact the son of juror Gratin Fields and offer $5,000 to the son and $5,000 to his juror father if the son would talk to his father and have him vote for the acquittal of Mr. Hoffa. Following this Mr. Hoffa stated to Mr. Partin that he had a colored male juror in his hip pocket and that his business agent, Larry Campbell, had fixed it. Upon other occasions Mr. Hoffa stated to Mr. Partin that all that was needed was a mistrial as the case would never be tried again and that he would pay $15,000 or $20,000 or whatever it cost to get to the jury.

Another juror selected to try the "Test Fleet" case was Mrs. James M. Paschal. Mrs. Paschal's husband was employed by the State of Tennessee as a highway patrolman. The Paschals lived in Woodbury, Tennessee, some distance from Nashville. After repeated urgings from Mr. Hoffa, Ewing King went to Woodbury on the night of November 17, 1962, and, along with an associate, Oscar Pitts, met Mr. Paschal at a secluded spot at 1:30 A. M. At that time Mr. King represented that he had influence in the state administration and that he would get Mr. Paschal a promotion in the Tennessee Highway Patrol if he, Paschal, would talk to his wife and get her to vote for the acquittal of Mr. Hoffa. After this was reported to Mr. Hoffa, he became upset because King had not gotten Mr. Paschal to take money, as that would have pinned him down. The "Test Fleet" trial ended in December 1962 in a mistrial when the jury was unable to agree upon a verdict.

Following the guilty verdicts the defendant Hoffa was sentenced a total of eight years, the defendant Parks was sentenced three years, the defendant Campbell was sentenced three years, and the defendant King was sentenced three years. A motion for a new trial was overruled and an opinion entered thereon. On appeal the conviction of each defendant was affirmed. United States v. Hoffa, 349

F.2d 20; affirmed 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), rehearing denied 386 U.S. 940, 87 S.Ct. 970, 17 L.Ed.2d 880 (1967).

A second motion for a new trial was filed on March 18, 1964, alleging newly discovered evidence. This motion was denied and the denial affirmed on appeal. United States v. Hoffa, D.C., 247 F.Supp. 692 (1965), affirmed 376 F.2d 1020 (6 Cir. 1967), cert. den. 389 U.S. 859, 88 S.Ct. 102, 19 L.Ed. 2d 124 (1967).

A third motion for a new trial, alleging newly discovered evidence, was filed September 1, 1965. This motion was denied. United States v. Hoffa, D.C., 247 F.Supp. 692 at 698 (1965); see also 245 F.Supp. 772 (D.C.1965). The denial of the third motion was affirmed on appeal. 382 F.2d 856 (6 Cir. 1967), cert. denied 390 U.S. 924, 88 S.Ct. 854, 19 L.Ed.2d 984 (1968).[2]

A fourth motion for a new trial was filed upon February 28, 1967, alleging newly discovered evidence of unlawful electronic surveillance. An evidentiary hearing was set upon this motion but upon that hearing counsel for the defendants advised that they were unable for ethical reasons to present any evidence in support of their motion. The fourth motion was thereupon decided upon the affidavits previously filed and was denied. United States v. Hoffa, D.C., 268 F.Supp. 732 (1967). The denial was affirmed upon appeal. 398 F.2d 291 (C.A.6, 1968). While a petition for certiorari was pending in the United States Supreme Court regarding the fourth motion for a new trial, the Government made disclosure of certain electronic surveillances directed at others but in which two of the defendants may

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[2] An affiant signing an affidavit in support of the third motion for new trial was indicted and convicted of perjury in connection with that affidavit. See United States v. Johnson, 414 F.2d 22, cert. den. 397 U.S. 991, 90 S.Ct. 1112, 25 L.Ed.2d 399, reh. den. 397 U.S. 1071, 90 S.Ct. 1495, 25 L.Ed.2d 696.

at times have appeared. Upon this disclosure being made, the United States Supreme Court remanded the case to this court for further proceedings in regard to the disclosure. An evidentiary hearing extending over six trial days and involving 33 witnesses was thereupon held. In the course of that hearing evidence was presented that upon May 8, 1963, some several months after the "Test Fleet" trial and one day before the indictment was returned in the criminal case here under attack, the Government installed a recording device in the automobile of Mr. Partin with his knowledge and consent and he had certain conversations with Mr. King on that date in the automobile. These matters are fully set forth in the opinion of this Court entered at the conclusion of that hearing and in which opinion the Court found no constitutional right of any defendant to have been violated in connection with any electronic overhearings, including the Partin-King recording, and further found that any matters overheard had not in any way been used upon the criminal trial, nor did they otherwise taint that trial. See United States v. Hoffa, D.C., 307 F.Supp. 1129 (1970). This action of the Court was affirmed upon appeal. 437 F.2d 11 (C.A. 6, 1971), cert. den. 402 U.S. 988, 91 S. Ct. 1664, 29 L.Ed.2d 154 (1971).

Legal Guidelines

Having completed a brief summary of the proceedings in this case to the date of the present petitions, it is appropriate to consider further the contentions made in those petitions. Before doing so, however, certain legal guidelines and principles should be noted.

The principle of law upon which the petitioners rely in their present petitions is that the Government may not knowingly use false testimony to obtain a criminal conviction. The leading recent authority for this principle is the case of Napue v. Illinois (1959), 360 U.S. 264, 79 S.Ct.

1173, 3 L.Ed.2d 1217. In that case a convicted defendant, having received assurance from the prosecuting attorney of assistance in obtaining a reduction in his sentence, testified against a co-defendant. In the course of his examination by the prosecuting attorney he denied that any promise of assistance had been made to him. Although the prosecuting attorney knew this testimony to be false, he did nothing to correct it. The Court held that the knowing use of false testimony by the state's attorney amounted to a denial of due process and that a conviction so obtained must be set aside and a new trial granted. In line with this principle, the ultimate issue to be determined by the Court in the present case is whether the Government knowingly used false evidence to obtain the convictions of the petitioners.

A matter to note at this point, however, is that it is the **knowing use** by the Government of false evidence that constitutes the denial of due process. An allegation of perjury, apart from an allegation of knowing use by the Government of that perjury, constitutes no basis for habeas corpus or coram nobis relief as it alleges no error of constitutional dimensions. The credibility of witnesses is ordinarily for trial by the jury in the criminal trial. False evidence and perjury are matters that may be raised on the trial and on motions for a new trial, but not in habeas corpus, Section 2255, or other post-conviction petitions. Otherwise every criminal conviction other than a plea of guilty would be subject to repetitious retrial on post-conviction petitions long after the criminal trial had occurred and long after time had erased both memories and witnesses, for few persons convicted of crime do not contend that something untrue was said in their trial. See United States v. Gonzalez, 33 F.R.D. 280, 282 (D.C., S.D.N.Y., 1960) affirmed 321 F. 2d 638 (C.A.2, 1963). Relevant matters in this regard are also discussed in the case of United States v. Osborne, 415 F.2d 1021 (C.A.6, 1969), involving a Section

2255 petition filed on behalf of one of the former attorneys for Mr. Hoffa in this case. Mr. Osborne was convicted upon a separate trial of endeavoring to bribe a member of the jury panel scheduled to try the criminal case here under attack. His conviction and sentence were affirmed upon appeal. See United States v. Osborne, 350 F.2d 497 (C.A.6, 1966) affirmed 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed. 2d 394 (1966) reh. den. 386 U.S. 938, 87 S.Ct. 951, 17 L.Ed. 2d 813 (1967).

Certain other principles of law generally relevant to habeas corpus, Section 2255 petitions, and other post-conviction petitions should be noted. The first such general principle of law to note is that mere allegations in such petitions of legal conclusions, apart from allegations of fact supporting those conclusions, are legally insufficient to entitle a petitioner to relief or to require an evidentiary hearing. A post-conviction petition must allege facts, which, if true, would entitle the petitioner to relief before an evidentiary hearing is required and before the relief requested can be granted. 28 U.S.C. § 2255; Stein v. United States, 390 F.2d 625 (C.A.9, 1968).

Finally, it is likewise settled law that even though allegations of fact are made in a habeas corpus petition, if the prior record in the case conclusively refutes those allegations of fact, then no evidentiary hearing on the petition is either necessary or appropriate. The petition then becomes one alleging mere legal conclusions. 28 U.S.C. § 2255; Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148; Evans v. United States, 408 F.2d 369 (C.A. 7, 1969).

Allegations of Perjury

Returning to the pending petitions, a review of the allegations in those petitions in light of the prior recorded testimony must be undertaken in order that the Court may determine whether an evidentiary hearing will be neces-

sary or appropriate. It is alleged that certain testimony given by the witness Partin in the criminal trial was false and that both the falsity of the testimony and the Government's knowing use of that false testimony is shown by the evidence received at the hearing on electronic surveillance in connection with the fourth motion for new trial. The first step in testing the sufficiency of these allegations to require an evidentiary hearing must be to place each alleged instance of perjury in its proper context. It may then be compared with the evidence received on the fourth new trial motion to determine whether evidence of falsity and of knowing use thereof by the Government exists.

For the purpose of placing each instance of alleged perjury in its proper context the citations of perjury will be considered in the order in which they are alleged in the amended petition of James R. Hoffa and as adopted by the other petitioners. By way of general preface, it should be noted that each instance of alleged use of perjured testimony relates to the testimony of the witness, Edward Grady Partin. Mr. Partin testified upon direct examination upon portions of two days and testified upon cross-examination for five days. His testimony covers some 1800 pages in the record [Tr. pp. 2981-4731 (Tr. citations are to the criminal trial transcript)].

(1) The first instance of alleged perjured testimony cited by the petitioners (¶ a) is the testimony of the witness Partin wherein he testified at the criminal trial, "I have never agreed to be an informer." (Tr. p. 3569) Placing the testimony in context, it should be noted that the cited testimony occurred upon the cross-examination of Mr. Partin and in his third day of testimony. He had previously fully described the circumstances under which he associated with Mr. Hoffa at the "Test Fleet" trial in Nashville, the circumstances under which he agreed to provide information to the Government, and the informa-

tion he had provided. (Tr. pp. 2981-3568) The line of inquiry immediately preceding the testimony cited as perjury was with regard to the date upon which Partin had first discussed with a government agent his willingness to provide information. The question then stated by the cross-examiner was, "When did you agree to be an informer?" And the answer was, "I never agreed to be an informer, Sir." In making this response it is apparent that the witness was objecting to the form of the question in describing him as an "informer". It is likewise apparent that counsel for the defense so understood, for in the very next question he reframed his question to omit the designation "informer" and inquired, "When did you tell anybody, whether it is a government or a state agent, that you would furnish information about Mr. Hoffa and the trial?" The witness then responded that this occurred after he had talked by telephone with Mr. Hoffa and learned that he was to meet him in Nashville. (Tr. p. 3575) Not only did the witness Partin disclose in his testimony the facts and circumstances as to when he agreed to provide information to the Government, but other government agents and witnesses were examined and cross-examined at length regarding these matters. See, for example, the testimony of the witnesses Sheridan (Tr. pp. 3125-3174 and 8151-8248), Daniels (Tr. pp. 5848-5925 and 8086-8149), Grimsley (Tr. pp. 8024-8085), and Pitcher (Tr. pp. 7133-7151). When read in context, it is apparent that the defendants were in no way misled or misinformed by the witness having rejected the designation of "informer". Furthermore, as noted above, the facts regarding the time and circumstances under which the witness Partin agreed to provide information to the Government were testified to in detail by other witnesses.

(2) The second instance of alleged perjured testimony cited by the petitioners (¶ b) is the following testimony of the witness Partin:

"Q. Isn't it true that Mr. Sheridan kept urging you to get more and more evidence on more and more people?

"A. He has never urged me to do anything other than what I saw." (Tr. p. 4118)

Placing this testimony in context, it occurred on the fifth day of the witness Partin's testimony and in his cross-examination by counsel for the defendant Dorfman. The witness was being examined regarding his testimony relating to conversations and telephone calls between defendants Dorfman and Tweel regarding their attempt to get a Nashville bar tender, Dallas Hall, to seek to influence a juror. The line of inquiry immediately preceding the testimony cited as perjury was with regard to whether the telephone calls between Dorfman and Tweel did not in fact relate to certain legitimate business transactions. The questions and answers at this point were as follows:

"Q. Now isn't it true that the phone calls that you say that you heard were really related to those business transactions and to the Hotel Pritcher at Huntington and the office building known as the West Virginia Building?

"A. I have never heard of those names before, sir.

"Q. You never heard of that? Isn't it true that Mr. Sheridan, Mr. Robert Kennedy's associate to whom you were reporting all these things, kept urging you to get more and more evidence on more and more people?

"A. He never urged me to do anything other than what I saw."

The witness had previously stated on his direct examination that his instructions from Mr. Sheridan was only to report matters regarding jury tampering. He had previously been asked a number of times on cross-examination regarding these instructions. When asked again he sum-

marized his former testimony by saying, "He has never urged me to do anything other than what I saw." Mr. Sheridan also testified on these matters. (Tr. pp. 3125-3174)

(3) The third and fourth instances of alleged perjury cited by the petitioners (¶¶ c and d) are the following extracts from the testimony of the witness Partin:

> ". . . I wasn't interested in getting anyone involved." (Tr. p. 4517)
>
> * * * * * * *
>
> "What you are saying, are you trying to make it look like I trapped someone as such? No." (Tr. p. 4517)

Placing the above testimony in context, it occurred upon the sixth day of the witness Partin's testimony and in the course of his cross-examination by counsel for the defendant Parks. The witness was being examined regarding his testimony that he had been advised by Mr. Buffalino, an attorney and Teamsters Union official, with respect to a grand jury subpoena. The questions and full answers at this point were as follows:

> "Q. Were you looking to inveigle Mr. Buffalino into making a statement when you came to him as a client and to discuss this subpoena before the grand jury, were you then looking to inveigle Mr. Buffalino into saying something which you could then carry back to Mr. Sheridan?
>
> "A. I didn't see anything to get him involved with, sir. I wasn't interested in getting anyone involved.
>
> "Q. At no time in your whole career in 1962 you had no interest in seeing anyone get involved in anything?
>
> "A. What you are saying, are you trying to make it look like I tried to trap someone as such? No." (Tr. p. 4517)

(4) The fifth instance of alleged perjury cited by the petitioners (¶ e) was given by the witness Partin out of the presence of the jury and in the course of a motion to suppress his testimony. The witness was being questioned by counsel for the defendant Dorfman regarding instructions given him upon his first coming to Nashville and his first contact with Mr. Sheridan, the government agent, in October 1962. The testimony was as follows:

"Q. You called him the first time to meet him. Is that right?

"A. I certainly did.

"Q. Now on that occasion the jury was being picked. Is that right?

"A. I believe they were, I am not sure of that now.

"Q. Did he give you any instructions with respect to your duties in overhearing things between the various parties in the case?

"A. No, sir. I didn't have any duties when it came to that.

"Q. Did he give you any instructions?

"A. Only if I heard any on jury tampering.

"Q. Did he explain to you what he meant?

"A. Attempting to influence the jury, buying them off.

"Q. What?

"A. Attempting to buy the jury off or influence the jury by buying them or some other means.

"Q. I see. Now, when was the first time you made a report to him?

"A. I didn't call it a report. I think I talked to him the afternoon of the day I was—the first day I came in on the 9th.

"Q. Did he give you any device or listening instrument to assist you in your work?

"A. No, sir." (Tr. pp. 3006-3006A)

It is clear that the foregoing testimony refers to the first meeting of Mr. Partin with Mr. Sheridan in October of 1962.

(5) The sixth instance of alleged perjury cited by the petitioners (¶ f) is the following testimony of the witness Partin: "I wasn't working for the Government, Sir." (Tr. p. 3022) This testimony was given out of the presence of the jury and in the course of a motion to suppress the witness's testimony. The witness was being questioned regarding his having given information to Mr. Sheridan, a government agent, during the course of the "Test Fleet" trial in October through December of 1962. Just prior to the cited testimony, the witness had testified as follows:

"Q. Were you paid by the Government?

"A. No, I wasn't.

"Q. Were you promised anything by the Government?

"A. No, I wasn't." (Tr. p. 3020)

Then followed the cited testimony:

"Q. Did you ever at any time advise Mr. Hoffa or anyone connected with the defense of his case, either attorney or assistants, that you were working for the Government?

"A. I wasn't working for the Government, Sir." (Tr. p. 3022)

Matters regarding payments made by the Government to Mrs. Partin for Mr. Partin's account were fully disclosed in the trial. The testimony regarding these payments was that they were for reimbursement of Mr. Partin's expenses incurred in meeting with government attorneys in preparation for the trial and at a date subsequent to all matters involved in the "Test Fleet" trial.

(6) The seventh instance of alleged perjury cited by the petitioners (¶ g) follows immediately after the above stated testimony and was accordingly given in the same context.

After stating that he was not working for the Government, the next questions and answers were as follows:

"Q. Did you ever advise them that you were furnishing the Government information?

"A. No.

"Q. Did you ever receive any instructions from Mr. Sheridan which related to your obtaining information concerning the course of the case?

"A. No.

"Q. Did you ever receive any instructions from him after the first time you talked to him?

"A. By instructions what do you mean? Would you qualify it?

"Q. By instructions to refrain from doing an act or saying certain things.

"A. No, sir.

"Q. Did he ever tell you to say certain things to Mr. Hoffa or any of the people connected with the case?

"A. No, certainly not." (Tr. p. 3022)

(7) The next citation of alleged perjury on the part of the witness Partin (¶ h) consists of a series of summary references regarding the circumstances under which the witness came to Nashville to be with Mr. Hoffa during the "Test Fleet" Trial in October, November and December of 1962. Without commenting on the accuracy of the summary, suffice it to say that these matters were explained thoroughly and repetitiously throughout both the direct and the cross-examination of the witness. All matters in connection therewith were fully disclosed to the defendants during the course of the trial, including the recordings of the telephone conversations between Mr. Partin and Mr. Hoffa, and these were read to the jury. (Tr. pp. 7540-7551) The defendants' contentions regarding any conflict in the evidence in connection with the cited testimnoy was fully presented to the jury. The defendants' contentions in this regard were likewise presented upon appeal and found to be without merit.

(8) The next citation of alleged perjury on the part of the witness Partin (¶ i) consists of the following testimony:

"Q. Did you have any kind of recording machine or something to take down everything that you heard so that you could review and impress your mind with it?

"A. No, Sir, I did not." (Tr. pp. 3624-3625)

Placing this testimony in context, it should be noted that the cited testimony occurred upon the cross-examination of Mr. Partin and in the third day of his testimony. He had just previously been asked by the cross-examiner to repeat his testimony regarding his conversation with Mr. Hoffa upon the date of October 25, 1962, a date shortly after the commencement of the "Test Fleet" trial. Before responding the witness asked first to see the hotel registration records showing the dates he was in Nashville so that he could place the date being referred to. The line of testimony at this point was as follows:

"Q. On October 25 did Mr. Hoffa make a statement to you and didn't you testify that he did make a statement?

"A. I believe I did. If I could see, I mean——

"Q. (Interposing) Well, I can't show you the statement. You didn't take any notes, did you?

"A. I'm not talking about the statement. No, Sir, I am talking about the hotel record.

"Q. Did you take any notes, Mr. Partin?

"A. I answered you on that long ago, no.

"Q. Answer me again, Sir.

"A. I said no, Sir.

"Q. Did you have any kind of recording machine or something to take down everything that you heard so you could review and impress your mind with it?

"A. No, Sir, I did not." (Tr. pp. 3624-3625)

It is clear that this refers to the conversation between Mr. Hoffa and Mr. Partin on October 25, 1962.

(9) The next citation of alleged perjury on the part of the witness Partin (¶ j) consists of the following testimony:

"Q. And how many times have you visited anybody connected with the Government in Washington in the Department of Justice or the F.B.I.?

"A. One time that I know of, Sir."

Placing this testimony in context it occurred upon the fifth day of the witness Partin's testimony and in the course of his cross-examination by counsel for the defendant Parks. Just previously he had been asked:

"Q. Did you go to Washington from July 1962 to the end of December 1962?

"A. It is possible. I have been to Washington several times.

"Q. Did you visit anybody connected with the Department of Justice?

"A. I talked to Mr. Sheridan at one time I was there, yes, Sir." (Tr. p. 4245)

The cross-examination then continued:

"Q. And did you meet Bobby Kennedy, the Attorney General?

"A. No, Sir. I never met him." (Tr. p. 4247)

* * * * * * * *

"Q. Well, could you fix it in your mind any better than a mere belief, would you say it definitely happened after the 22nd of October?

"A. Well, I would think so, I have been there so many times to Washington on other matters and things.

"Q. Yes, and how many times have you visited anybody connected with the Government in Washington at the Department of Justice or the F.B.I.?

"A. One time that I know of, Sir.

"Q. Pardon me?

"A. One time that I know of.

"Q. That's the only time?

"A. As far as I can remember definite it was unless it would have been when I have been introduced to one of the people that I was visiting over to the capitol." (Tr. p. 4252)

Allegations of Knowing Use of Perjury

This completes the citation of alleged perjured testimony as set forth in the amended petition now before the Court. The remaining portions of the amended petition (¶ 3 to end) set forth the petitioners' contentions in support of their allegation that the cited testimony was false and that the Government used it with knowledge that it was false. The original petition, before amendment, alleges that both the falsity of the testimony and knowledge on the part of the Government of its falsity is established by the evidence introduced upon the fourth motion for new trial relating to electronic surveillance and to which reference has previously been made. It will accordingly be necessary to review the pertinent parts of that record and compare them with the testimony of the witness Partin, which testimony is cited as being false. Before doing this, notice should be taken of certain contentions advanced in the amended petition and which are not related to the evidentiary record on the fourth new trial motion.

The contention is made in paragraph 4 of the amended petition that knowing use of perjured testimony occurred when the witness Partin denied having agreed to be an informer. As noted in paragraph (1) above, the circumstances under which Mr. Partin was associated with Mr. Hoffa at the "Test Fleet" trial in Nashville, the circumstances under which he agreed to provide information to the Government, and the information which he provided

were fully and exhaustively presented and tried before the jury. The witness's rejection of the defendants' characterizing him as an "informer" withheld no fact from the jury regarding his activities. These matters were fully argued before the jury and the credibility of the witness was for the jury. When this testimony is viewed in context, and in light of the full record upon the trial, it could form no basis for a charge of knowing use of perjured testimony by the Government.

The further contention is made in paragraph 4 of the amended petition that knowing use of the perjured testimony occurred in the testimony of Mr. Partin regarding the circumstances under which he came to Nashville to be with Mr. Hoffa during the "Test Fleet" trial. These matters were fully tried and argued before the jury. They were likewise argued in the first motion for new trial and on appeal, and were found to be without merit. See United States v. Hoffa, 349 F.2d 20, affirmed 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), reh. den. 386 U.S. 940, 87 S.Ct. 970, 17 L.Ed.2d 880 (1967).

It is further contended that Mr. Partin's testimony regarding the number of his visits to Washington is in conflict with testimony in the surveillance hearing that a witness saw him there upon three occasions. The review of Mr. Partin's testimony in this regard and as set forth in paragraph (9) above would reflect no conflict. He testified that he had been to Washington many times, that he recalled having visited the Department of Justice one time and having been introduced on other times.

Turning to the evidentiary record made upon the fourth motion for new trial, reference is made to the opinion of this Court on that motion wherein a full discussion of that record is set forth. See United States v. Hoffa, D.C., 307 F.Supp. 1129 at 1138. As reflected in that opinion, testimony was received that upon May 8, 1963, some several months

after the "Test Fleet" trial, and one day before the indictment was returned in the criminal case here under attack, the Government installed a recording device in Mr. Partin's automobile with his knowledge and consent and he had certain conversations with Mr. King on that date in the automobile. As found by the Court in its opinion, and as affirmed upon appeal [See United States v. Hoffa, 437 F.2d 11 (C.A.6, 1970) cert. den. 402 U.S. 988, 91 S.Ct. 1664, 29 L.Ed. 2d 154 (1971)], this recording disclosed no information not previously known to the Government and was discarded as useless by the Government. It is the essence of the petitions now before the Court that the failure to disclose the fact and the existence of the Partin-King recording in the course of the criminal trial renders false the testimony of the witness as hereinabove cited and discussed in paragraphs (1) through (9), and renders its use by the Government without correction a violation of due process under the case of Napue v. Illinois (1959), 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217. The clear answer to this contention is that the witness Partin was never asked a question in the course of the criminal trial that would call for a response disclosing the Partin-King recording and the witness never gave a response that would deny the existence of that recording. The Partin-King recording simply formed no part of the criminal trial, as found in the Court's opinion upon the fourth motion for new trial. As stated in that opinion (307 F. Supp. 1129 at 1141):

> "The recording, if used in the trial, would at the very most have been of a purely cumulative nature. Nothing was said in the recording of the slightest relevance to the trial that was not testified to by witnesses in the trial, including both Partin and King. The only other possible use of the recording would have been for the cross-examination of the witness Partin. The extremely extensive cross-examination of this witness

on all matters, including all matters touched upon in the recording, renders any possible error in the non-disclosure of the recording harmless beyond a reasonable doubt. This conclusion is further required by the extensive and overwhelming nature of the evidence of each defendant's guilt when the record is viewed as a whole."

In view of the clear lack of merit of the petitions before the Court on the face of the record, it is unnecessary to consider further motions pending herein. Orders will enter dismissing each petition.

APPENDIX D

No. 20271
No. 20272

United States Court of Appeals
For the Sixth Circuit

No. 20,271
United States of America,
Plaintiff-Appellee,
v.

James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King,
Defendants-Appellants.

No. 20,272
United States of America,
Plaintiff-Appellee,
v.

Ewing King,
Defendant-Appellant.

} Appeals from the United States District Court for the Eastern District of Tennessee.

Decided and Filed January 21, 1971

Before: Peck, McCree and Brooks, Circuit Judges.

Brooks, Circuit Judge. In March of 1964 defendants-appellants, James R. Hoffa, Thomas Ewing Parks, Larry

Campbell and Ewing King, were convicted for endeavoring to influence, impede and intimidate jurors in the discharge of their duties. (18 U.S.C. § 1503—The Federal Obstruction of Justice Statute.) The alleged jury tampering involved attempts by these defendants to influence jurors who served on a case in which Hoffa was a defendant—the Test Fleet Case. Following the convictions for jury tampering, appellants filed motions for new trial which were denied and each conviction and the denial of the motions for new trial were affirmed by this Court, **United States v. Hoffa**, 349 F.2d 20 (6th Cir. 1965), affirmed 385 U.S. 293 (1966), reh. denied 386 U.S. 940 and 386 U.S. 951 (1967). A second group of motions for new trial were filed by appellants and denied. See **United States v. Hoffa**, 247 F.Supp. 692 (1965), affirmed 376 F.2d 1020 (6th Cir. 1967), cert. denied 389 U. S. 859 (1967). Appellants then filed a third round of motions for a new trial alleging newly discovered evidence. These motions were also denied, **United States v. Hoffa**, 247 F.Supp. 692 at 698 (1965), affirmed 382 F.2d 856 (6th Cir. 1967), cert. denied 390 U.S. 924 (1968). Finally, a fourth group of motions for new trial were filed, and it is a result of these motions that this case comes to us for review. This fourth attempt to obtain a new trial was denied by the District Court, **United States v. Hoffa**, 268 F.Supp. 732 (1967), and affirmed by this Court, 398 F.2d 291 (6th Cir. 1968). Appellant King did not perfect an appeal from the denial of his fourth motion for a new trial. After this Court affirmed the last denial of the motions for a new trial, 398 F.2d 291 (6th Cir. 1968), a certiorari petition was filed in the United States Supreme Court. While this certiorari petition was pending, the Solicitor General of the United States, complying with the Supreme Court's decision in **Kolod v. United States**, 390 U.S. 136 (1968), disclosed that "although none of these petitioners was ever the subject of electronic surveillance directed against him two

of the petitioners did participate in conversations which were monitored during the course of electronic surveillance directed against others." The Supreme Court then granted certiorari, set aside the judgment of this Court, and remanded the case to the District Court to determine "whether the surveillances at issue were lawful." See, **Giordano v. United States**, 394 U.S. 310 (1969).

While the Supreme Court's remand order applied to only appellants Hoffa, Parks and Campbell, the District Court permitted appellant King to participate in the remand hearing treating his motion as a petition for habeas corpus. At the time of the remand hearing, all appellants except Hoffa had completed serving their sentences. After a six day evidentiary hearing to determine the lawfulness of the surveillance, the District Court concluded "that no violation of any defendant's rights has been shown under the direction given by the United States Supreme Court in **Giordano v. United States**" and affirmed the convictions and sentences imposed upon the defendants. See, **United States v. Hoffa**, 307 F.Supp. 1129 (1970). It is from this ruling that appellants have now appealed. As can readily be seen, the history of this litigation is long and involved. However, on this appeal we are only presented with the question of the correctness of the District Court's ruling on the legality of the electronic surveillances, and we affirm that determination.[1]

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[1] The limited scope of appellate review in this case is dictated by the Supreme Court's remand order in **Giordano v. United States**, 394 U.S. 310, 311-12 (1969). There it was spelled out that since "[i]t is not evident from the records . . . whether the surveillances at issue were unlawful . . . 'the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful.' Of course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary." The newly discovered facts developed during the remand hearing and referred to in Judge McCree's opinion concurring in part and dissenting in part are not properly before us, see **United States**

The electronic surveillances in these cases were accomplished by wire tapping of telephones and "bugging" (strategic placing of an electronic receiving device so as to overhear the conversation of individuals within proximity of the device). The Hoffa surveillances consisted of four wire taps of the executive offices of two gambling casinos in Las Vegas, Nevada, and three monitorings of radio telephone conversations over special FM frequencies in Detroit, Michigan. The District Court concluded that these surveillances did not violate the rules established in **Wong Sun v. United States**, 371 U.S. 471 (1963), as to surveillances accomplished by means of trespass, and none of appellant Hoffa's constitutional rights were violated.

Appellant Campbell's surveillance consisted of some 254 monitorings of radio telephone conversations. These monitorings were accomplished by simply listening in on a special FM frequency that the Teamsters Union used in transacting business by radio telephone. The District Court concluded that since anyone with an FM receiver could have heard these conversations, there was no violation of appellant Campbell's Fourth Amendment rights.

There were no electronic surveillances of appellant Parks, and the thrust of his argument on this appeal is that the surveillances of Hoffa, Campbell and King, if illegal, in some way violated his constitutional rights. This same argument is made by appellants Hoffa and Campbell with respect to the surveillances of appellant King. On this appeal, neither Hoffa nor Campbell challenge the District Court's ruling on the legality of their respective surveillances, but rather question the correctness of the District Court's ruling on the legality of King's

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v. Beal, 404 F.2d 58 (6th Cir. 1969), cert. denied 393 U.S. 1084; **United States v. Aguillar**, 387 F.2d 625 (2nd Cir. 1967), and appropriate procedures which are to be originated in the District Court are available if appellate review of these matters are sought. See, Rule 33 Federal Rules of Criminal Procedure.

surveillance. Since it is concluded that the King surveillance was legal, it is not necessary to reach the issue of whether appellants Hoffa, Campbell and Parks have standing to raise alleged violations of appellant King's constitutional rights.[2]

There was only one electronic surveillance (a "bugging") of appellant King, and it is this surveillance appellants argue was unlawful. An associate of the appellants who was also a government informant had his automobile wired with an electronic receiver and tape recorder. The informant arranged a meeting with appellant King and the two men rode around Nashville, Tennessee, in the informant's automobile engaging in a ninety minute conversation which was taped.

Appellant King raises several constitutional challenges to this surveillance. First, it is alleged that the surveillance violated his Fourth Amendment right to be free of illegal searches and seizures. The taping of the conversation between the government informant and King took place with the consent of the informant, see, **Kaufer v. United States**, 391 U.S. 458 (1969); **Lopez v. United States**, 373 U.S. 427 (1963); **On Lee v. United States**, 343 U.S. 747 (1952); cf. **United States v. Osborn**, 350 F.2d 497 (6th Cir. 1965), **affd. Osborn v. United States**, 385 U.S. 323 (1966); and was not the by-product of a trespass onto appellant's premises, see, **Alderman v. United States**, 394 U.S. 165, 171-176 (1969). Cf. **United States v. Hoffa**, 349 F.2d 20, 48 (6th Cir. 1965). Thus, under existing Supreme Court interpretation, it cannot be said that King's Fourth Amend-

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[2] Appellant Hoffa's right to raise alleged violations of appellant King's constitutional rights also stems from the fact that Hoffa was indicted and convicted as an aider and abettor of King for jury tampering. Because of this fact, Hoffa may have more of a concrete right than Campbell or Parks to raise questions about the validity of the King surveillance. However, as we conclude that the surveillance was legal, we do not reach this question.

ment rights were violated by the fashion in which this electronic surveillance was accomplished.

Second, King alleged that his Fifth and Sixth Amendment rights were violated by the government's surveillance of this conversation. It is argued that the surveillance was constitutionally impermissible because it resulted in his giving evidence against himself without being advised of his Fifth Amendment rights or his right to assistance of counsel. The difficulty with appellant's challenges to the surveillance on Fifth and Sixth Amendment grounds is that they require an unwarranted extension of existing case precedents. Respecting the claim of violation of appellant's Fifth Amendment right, present case law, notably **Miranda v. Arizona**, 384 U.S. 436 (1966), requires some element of compulsory self-incrimination. Here there was neither an in-custodial interrogation nor any compelling pressure applied which forced appellant to incriminate himself. See also, **Hoffa v. United States**, 385 U.S. 293, 304 (1966). Furthermore, appellant's attack on the surveillance based on alleged violation of his Sixth Amendment right to assistance of counsel does not find support in present case law. See, **Massiah v. United States**, 377 U.S. 201 (1964); **Escobedo v. Illinois**, 378 U.S. 478 (1964). In **Escobedo** there was an in-custodial interrogation **after** arrest without assistance of counsel and in **Massiah** the surreptitious surveillance took place **after** indictment following Massiah's retention of counsel, pleading not guilty to the charge for which he was indicted and his release on bail. In this case the surveillance of appellant King took place the day preceding his indictment. An argument similar to appellant's based on the contention that at the time of the surveillance he was "a virtual defendant" was made by appellant Hoffa in the initial appeal of this case and rejected by the Supreme Court. See, **Hoffa v. United States**, 385 U.S. 293, 309 (1966). Accordingly, it is conduded that appellant King's

Sixth Amendment right to assistance of counsel was not violated by the surveillance in this case.

Appellant also maintains that government non-disclosure of the surveillance and recording of the conversation at the original trial constituted suppression of material evidence under the rules recognized in **Giles v. Maryland**, 386 U.S. 66 (1967), and **Brady v. Maryland**, 373 U.S. 83 (1963). At the evidentiary hearing upon remand by the Supreme Court, the District Court reviewed the transcribed text of the conversation and concluded that "while portions of the recording do relate to the case, they are neither of an incriminating nor an exculpating nature." (Appended to this opinion is the text of the conversation.) A reading of the **Brady** decision indicates that suppression of evidence following request for disclosure violates due process "where the evidence is material either to guilt or to punishment . . . ." **Brady v. Maryland**, 386 U.S. 66 at 87. Independently reviewing the conversation, we agree with the District Court's conclusion that the conversation was neither of an incriminating nor exculpatory character requiring disclosure.

The last argument raised by appellant is that non-disclosure of the surveillance at the original trial, following a request for production of all electronic surveillances, violated 18 U.S.C. § 3500—The Jencks Act. The simple answer to this contention is that 18 U.S.C. § 3500 applies to production of statements "made by a government witness or prospective government witness (other than the defendant) to **an agent** of the government . . . ." (Emphasis added). The recorded conversation between appellant King and the government informant is simply not a statement made "to an agent of the government." See, **United States v. Sopher**, 362 F.2d 523, 526 (7th Cir. 1966), cert. denied 385 U.S. 928 (1966).

The judgment of the District Court is affirmed.

Appendix

UNITED STATES DISTRICT COURT

EXHIBIT No. 12

Transcription of Tape Recording

King: Ed, I'm sure glad you came out of that damn thing down there.

Partin: Picked that damn paper up there and read about the thing coming up tomorrow, and get a book and it's in the book. Which way you?

King: Go straight on down.

Partin: Who is that fellow Tibbens or Tippens mentioned in that book?

King: He's the one that came in here and reported to the Judge while they were trying to select a jury that he had been offered some money and that, that, and the other.

Partin: What does he do?

King: . . . I don't think he does anything, Ed.

Partin: . . . do you reckon they got enough to bring out some indictments on that thing up there?

King: I don't know. I doubt seriously that with a story like this in here that they will bring indictments. There's a little piece in the paper today, I don't know whether you saw it or not, saying the grand jury would have to meet to return indictments.

Partin: Damn if they didn't have you.

King: They shore got me in there haven't they?

Partin: The only thing they missed was where you were going hunting so they must not give the whole story, must have added a lot together.

King: The truth of the matter is, Ed, the night I went down to this place, went down there and met with this Mutt Pitts and went to his house . . . and when you come right down to it, now this is the actual facts, I told my wife I had to go to Mutt's place; that we were going to arrange for a rabbit hunt Thanksgiving. I wanted to try out this old car. I got off George anyway to see whether it was any good or not. When we got down there, this old boy's wife's daddy is real bad sick, but he's a real good friend of mine, real good, and we sat up there and drank coffee and had some cokes for a while. This old boy said we ought to be able to see him in a few minutes, I'll go down and see and get some Coca Colas. When he came back he said this old boy wants to see you after while. He wants to get a promotion. He has been on the patrol 12 years. So we talked, and we talked, and we made him talk, or I made him talk. And then, I don't know whether he has changed his story or not. They say that he has, but this story in the magazine says he hasn't. The magazine is still writing the same story that he gave before the damn court up there. So, I don't know whether he has or whether he hasn't, but in view of this very thing during this time and many many other times the record will prove that I have been to every one of them suckers, these boys at one time or another to get promotions for these guy. So, hell fire, I talked to the Governor the other day. He said I'm so glad that Jimmy Hoffa beat them. . . . He sure did. I talked to the Chief of Police last night, right over there, and he said I'm so glad that Hoffa outsmarted everybody up there. . . . That's about all I've heard recently.

Partin: Do you think that if they got indictments they can convict anybody here . . . ?

King: I doubt it very seriously. I doubt it very very seriously. I sure do. I'm going to get me a lawyer and beat their ass. There's one here in town that can beat any of them—Jack Norman. I'll get him.

Partin: Now, look this fellow that they called. Do you know Tweel?

King: (Unintelligible, but apparently a negative reply.)

Partin: Do you think that highway patrolman will stay put?

King: I have always believed he would stay put. However, there have been a lot of rumors circulating around that he has changed his story from what he told the Court because he was afraid and all this, that and the other but I do not believe he has done it. And I don't see how anybody else would know it either, you know, unless they've been in there. So, as far as I am concerned there's, and Jim, I been in Philadelphia with him for a week, every day, he don't believe that they will even get any indictments, not after this long period of time. Five months have gone by.

Partin: Speaking of Chuck, I don't know how to figure Chuck. One night we were coming from O'Brien's in a cab, and he drove around and around and around and all of a sudden jumped out, said I'll see you later, and got in an old two tone Buick. Acted like he was scared to death . . . .

Partin: I read in the paper about that damn longshoreman . . . .

King: I am not convinced that they can get a conviction on me or anybody else since they have taken as much time as they have. If it takes them that long for them to get us, it will take them a damn sight longer to make them stand up.

Partin: Is Jimmy worried?

King: Don't seem to be, a bit.
Some talk here about Fields.

Partin: What's he doing now? (Believed to refer to Don Vestal).

King: Nothing that I know of. Was with steelworkers last account I had of him. They made me put him back and I'm fixing to put him back out on the . . . as soon as I can have a board meeting.

Partin: He don't come to the hall, or nothing?

King: He comes to the meetings but he won't stay but about 15 or 20 minutes. I start lowering the boom on his ass and he will leave right away.
Some talk here about where Vestal lives—talk about some grievance and about somebody retiring. Some speculation as to whether Vestal lives on Grandview Drive or Avenue.

King: If that highway patrolman stays put, they ain't got a thing.

Partin: What about that little fellow . . .?

King: Who went with me? He's just as solid as that bus up yonder. Yes, sir, I was down to his house just a little while back. Me and my wife were down there Sunday evening. That's when I called up the Marshal and told him I was going down there and if he wanted to go he wouldn't have to drive his own car, he could go with me.

Partin: You know where they sell General tires? I need me one on the left front wheel.

King: There's one down on Broad Street.
Some talk about a union election lost by Teamsters to Steelworkers.

King: Those fellows up yonder (meaning Philadelphia), they damn near run me crazy. That was a rough deal up

there. One boy went wild, he went all to pieces. One of our men. . . .

Partin: Wonder how many indictments they will come out with?

King: They will either come out with a real small amount, Ed, or they will get a whole damn bunch of us. I'm convinced that they are going to indict me, a boy out of Detroit, Larry Campbell, Chuck, Hoffa, and maybe at least three more. . . .

Partin: Looks to me like they will have a rough time getting a Judge who doesn't know all about this thing.

Partin: How will Broda stand up?

King: He's all right, Ed, he don't know a thing.

Partin: Does he know anything about me at all?

King: No, sir, Ed, he don't know a thing in the world about me. As far as he knows the night we swapped cars we swapped for the purpose of him trading for the Thunderbird and me taking his car. That's all he knows now. I wouldn't have, you see I knew how weak he was. If somebody hit him over the head with a blackjack he would sing the star spangled banner . . .

Partin: I believe Twell is the weak link in this thing. I always will believe it.

King: Do you reckon?

Partin: He hasn't come around. He told me he wanted me to meet him in Miami; that he would call me and he ain't called me yet.

King: I guess I remember the man, but I can't place him.

King: I have another man here who is really giving me all the trouble he can . . . Perry Canaday, that served that workhouse sentence about four years ago on the barber shops. He works with Super Service. He's telling everybody he can run into he hoped they put me in the penitentiary. He's mad at me because I would not hire him. I couldn't hire him on account of his record, if I wanted to. I did not want to in the first place because he is stupid. He's beating his gums everyday and one of these days I am going to have to knock him on his ass myself, as sure as God made little apples . . .

Partin: Didn't you see them damn cars following you like that book said?

King: Well, they didn't follow me period they were watching Paschal's home and once they saw this car with Nashville license in the driveway of this Paschal's home, then's when they turned to the . . . You see they hadn't seen me. That is the reason you know the magazine said they put these spotters out to watch me when I got home to make sure I was driving that car because they did not put me in that car down there. They didn't follow me to Woodbury. They were watching Paschal's house and when Mutt Pitts took my car and went down there to get some cola colas and went by James Morris' house to see whether he had come in or not, that's when they got suspicious and wondered who was driving the car and everything.

King: Pull up on that rack right there. I used to know an old boy out here. Don't know whether he is still out here or not.

(Apparently stopped at McDowell General Tire Service and had a tire put on front wheel. Were out of the car most of the time.)

King: Okay Bob, good to see you.

Partin: Man, that saved me $18.00.

King: We could go back out this way and hunt that house up for sure . . . It's 1012 instead of 1211.

Partin: You all had a lot of fun in Philadelphia?

King: . . . I talked to Jim for an hour and a half. I told him I was going back to Tennessee; that I had a flight out the next morning. They are two hours faster than we are. I got home in time to do a day's work. We stayed up so damn much up there, day and night. I got a cold and I ain't been able to throw it off yet.

Partin: His spirits were pretty good after that?

King: Oh yeah . . . After the vote came in, we went down to the union hall.

Partin: Didn't they indict Chuck up there?

King: Hell yes, we talked about that. Jim said it wouldn't count up. Indicted him on that car and that damn ship deal. A convoy off a ship or something or other. Of course, he's an eager beaver . . . He shakes down every operator that he has anything to do with . . . He told me this himself.

Partin: That's what hurts us, things like that.

Partin: Bufalino told me Campbell got messed up with some whores up there . . .

King: Is that right?

Some talk of Jimmy giving someone two minutes to get out of town. Some more talk about Campbell. King indicated he saw Campbell in Detroit and Campbell said he had tried to call King when he was in Nashville for the grand jury.

Partin: What about that fellow Bell, did I ever meet him?

King: I don't know. I didn't Ed, I probably saw him.

Partin: He must have gone crazy on that damn phone, the way the paper talked.

King: Most of his calling was from out of town though, it wasn't in town. He called Tenpenny, Mutt Pitts and this highway patrolman and everybody else.

Partin: Did he know them?

King: He was trying to buy a race horse.

Partin: You are talking about that guy on the jury?

King: No, that official—that longshoreman, Bell.

King: He called them from Memphis and everywhere he stopped.

Here, they apparently located a house at 1012 Grandview Avenue. King gave Partin instructions as to how to go out of town, by going out Granny White Pike. King said something about having called Dick Farrel.

King: Jim, he's been just jam up with me.

Partin: You went all out for him. He ought to be.

King: He told somebody up in Philadelphia the other day, this is Ewing King, said he helped me down in Nashville more than anybody will ever know.

Partin: I laughed that morning you told Jimmy that woman would sit there til hell froze over.

King: That would have happened.

Partin: That was on account of kicking that woman off?

King: Yep.

Partin: He brightened up too, didn't he?

King: Yes.

King: He (apparently referring to O'Brien) told me more lies than you ever heard tell of. He said his Daddy got killed on a picket line. Jimmy raised him up since he was three years old. I was putting up with a lot of bull.

Partin: Why did Jimmy get messed up with him?

King: Family obligations . . .

Partin: Why did he get messed up with that stuff on the ship?

King: Ed, that's just one of those things . . . He gets himself into everything that comes along.

Some talk here about John J. Hooker, Sr. and John J. Hooker, Jr.

King: Miller (possibly referred to Judge William E. Miller, U. S. District Court) hates me with a passion.

Partin: Who don't he hate?

King: I haven't lost a thing with him, so that feeling is mutual.

Here, they exchanged pleasantries, said good-bye.

McCree, Circuit Judge (Concurring in part and dissenting in part). I concur in the opinion of the court insofar as it affirms the District Court's ruling on the legality of the electronic surveillance employed in the investigation of this case. However, the fact, revealed for the first time during the hearing on remand, that Edward Partin participated in the recording of a conversation between Partin and King while they were seated in Partin's automobile raises a serious question whether the Government knowingly used perjured testimony in the original trial. Partin testified, on a motion to suppress evidence, that Walter Sheridan, the agent in charge of the investigation, had never given him any device or listening instrument to assist him in his work. Transcript at 3006A. At the hearing to determine the legality of the recording of the King-Partin conversation, Sheridan testified that Partin had

made his car available for the concealed installation of the instruments and recorder. Testimony by James Neal, the prosecuting attorney, indicates that he was aware of the fact that Partin had cooperated in securing that recording.

The Partin testimony was crucial to the conviction of appellants. Had the Government revealed that Partin perjured himself during the trial, defense counsel could have used that fact to impeach this key Government witness.* I would remand the case to the District Court for a hearing to determine whether reversal is required by the principles announced in **Napue v. Illinois**, 360 U.S. 264 (1959).

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* Athough I am aware of the limited scope of the Supreme Court's remand order in this case, I do not believe the District Court should thereby be prevented from taking cognizance of the possibility of a departure from basic fairness which might have tainted the outcome of the trial.

APPENDIX E

United States Court of Appeals
for the Sixth Circuit

No. 72-1332

James R. Hoffa,

Plaintiff-Appellant,

vs.

United States of America,

Defendant-Appellee.

Before: PHILLIPS, Chief Judge, McCREE, Circuit Judge, and CECIL, Senior Circuit Judge.

Judgment

(Filed January 3, 1973, James A. Higgins, Clerk)

(Filed May 2, 1973, Karl D. Saulpaw, Jr., Clerk)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized

below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk

Issued as Mandate: May 1, 1973

Costs: None

Filing fee ..... $....

Printing ..... $....

Total $....

A true copy.

Attest

JAMES A. HIGGINS
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-74

JAMES R. HOFFA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this, his fifth post-conviction proceeding, petitioner contends that his motion to vacate sentence under 28 U.S.C. 2255, alleging the commission of perjury by a government witness, was improperly denied without an evidentiary hearing. He further argues that the motion should have been decided by a judge other than the trial judge. Finally, he contends that the court improperly denied his motion to depose the government witness who had allegedly committed perjury.

In 1964, petitioner and others were convicted in the Eastern District of Tennessee of jury tampering in connection with a 1962 criminal prosecution of petitioner in the Middle District of Tennessee.[1] Their convictions,

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[1] On December 22, 1972, petitioner's sentence on these and other charges was commuted, pursuant to a grant of executive clemency.

and the denial of their motions for a new trial, were affirmed on appeal. 349 F. 2d 20 (C.A. 6), affirmed, 385 U.S. 293. Subsequent motions for a new trial, based on assertions of newly discovered evidence, were denied, and the denials were affirmed on appeal. 247 F. Supp. 692 (E.D. Tenn.), affirmed, 376 F. 2d 1020 (C.A. 6), certiorari denied, 389 U.S. 859; 247 F. Supp. 692, 698 (E.D. Tenn.), affirmed, 382 F. 2d 856 (C.A. 6), certiorari denied, 390 U.S. 924.

Petitioner then filed a further motion for a new trial based on an assertion of newly discovered evidence of unlawful electronic eavesdropping. This motion was also denied, 268 F. Supp. 732 (E.D. Tenn.); the denial was affirmed on appeal, 398 F. 2d 291 (C.A. 6), and a petition for a writ of certiorari was filed (No. 546, O.T. 1968). In response to that petition, the government advised this Court that conversations in which petitioner and a co-defendant had participated, which bore no arguable relevance to petitioner's prosecution, had been overheard during the course of an electronic surveillance directed against others. The Court remanded the case (*sub nom. Giordano* v. *United States*, 394 U.S. 310) for further proceedings in conformity with its decision in *Alderman* v. *United States*, 394 U.S. 165. After an evidentiary hearing, at which the records of all overheard conversations involving petitioners were produced, the district court again denied the motion for a new trial. 307 F. Supp. 1129 (E.D. Tenn.). This decision was affirmed, 437 F. 2d 11 (C.A. 6), certiorari denied, 402 U.S. 988.

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to six and one-half years' imprisonment and he was released from prison. The grant of clemency was conditioned upon petitioner's non-participation in the management of a labor union until March 6, 1980.

On May 24, 1971, petitioner filed in the district court the present motion to vacate sentence pursuant to 28 U.S.C. 2255. Petitioner alleged that a government witness, Edward G. Partin, had perjured himself at trial, that the government had knowingly used his perjured testimony, and that the principles enunciated in *Napue* v. *Illinois*, 360 U.S. 264, required that the judgment of conviction be set aside. The motion was based on the disclosure made at the *Alderman* hearing that, prior to the return of the indictment against petitioner and his co-defendants, a recording device was installed in an automobile of Partin and that certain conversations Partin had with petitioner's co-defendant, Ewing King, were recorded (Pet. App. A-3). Petitioner alleged that the fact that this event transpired proved that certain testimony given by Partin at trial was false (Pet. 8-9).[2]

The district court in an exhaustive opinion (Pet. App. A-8 to A-30), upon which we rely here, examined the allegedly false statements and concluded that petitioner's claims were conclusively refuted by the record. The Section 2255 motion was, therefore, denied without a hearing. The court of appeals affirmed the finding of the district court regarding "the allegations of perjury" (Pet. App. A-4) and, as did the district court (Pet. App. A-29, A-30), rejected for the *second* time the claim that the failure to disclose the existence of "the Partin-

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[2] Petitioner did not allege that any specific testimony given by Partin at trial would be contradicted by the contents of the transcript of the conversation (Pet. 8-9). Moreover, as the district court found, "the witness Partin was never asked a question in the course of criminal trial that would call for a response disclosing the Partin-King recording and the witness never gave a response that would deny the existence of that recording" (Pet. App. A-29).

King recording, was so nefarious and contemptuous as to require reversal under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 * * *" (Pet. App. A-4).[3]

The court of appeals likewise rejected petitioner's claims that his application to take the deposition of Partin was improperly denied (Pet. App. A-4) and that the district court judge should have recused himself[4] (Pet. App. A-5). We rely on the opinions of the district court and the court of appeals, which fully answer each of petitioner's claims here, in urging that the petition for a writ of certiorari be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[3] This issue had been raised and decided in the preceding Section 2255 hearing. On the present second successive application for similar relief, summary denial was especially appropriate. *Sanders* v. *United States*, 373 U.S. 1.

[4] Petitioner alleges that the decision of the First Circuit in *Halliday* v. *United States*, 380 F. 2d 270, conflicts with the holding of the court of appeals on this issue. The court below held that the trial judge was under no obligation to recuse himself simply because certain issues raised in the Section 2255 motion were arguably raised before the trial court on a separate occasion. In *Halliday*, the court held that in Section 2255 petitions alleging an erroneous finding of voluntariness with respect to a guilty plea (Rule 11, Fed. R. Crim. P.), the better practice would be for a judge other than the initial fact-finder on this issue to consider the motion. The holding is thus limited to "factual issues in this particular area" (380 F. 2d at 274), *i.e.*, Section 2255 challenges under Rule 11. Cf. *United States* v. *Zannino*, 468 F. 2d 1299 (C.A. 1). Moreover, the court expressly provided that the sentencing judge could, as here, properly review a Section 2255 petition to conclude that no evidentiary hearing was required on the issue.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-74

JAMES R. HOFFA,
Petitioner,

vs.

United States of America,
Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES

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REPLY TO MEMORANDUM FOR THE UNITED STATES

The government relies solely on the opinions of the District Court and Court of Appeals without giving any reasons for their not wanting a hearing or any reasons why they were afraid to permit the taking of Partin's deposition. Thus, the government fails to explain why they opposed an evidentiary inquiry into the serious possibility that the government knowingly used perjured testimony to convict Hoffa, as suggested by Circuit Judge McCree.

Petitioner suggests that the record supports his allegations that the government knowingly used perjured testimony and that his conviction should be reversed. However, the only issue before this Court **now** is whether certiorari should be granted. In making this decision, petitioner submits that this Court need only determine at a minimum, whether it should review the lower court's refusals to permit a hearing and taking of Partin's deposition. Again, the government has not explained to this Court why they fought an inquiry, under oath, into the grave questions raised herein.

CONCLUSION

For the reasons stated herein, we respectfully submit that the petition should be granted.

Respectfully submitted

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